# THE IMPACT OF ARTICLES 12, 18, 39 AND 43 OF THE EC TREATY ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS ([526])

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## I. INTRODUCTION

In this contribution we are going to analyse the way the interpretation by the Court of Justice (CJ) of the citizenship provisions, and the CJ's novel reinterpretation of the free movement rights, have affected social security systems, and in particular how they relate in a new way with the secondary legislation which coordinates national provisions concerning welfare benefits ([527]).

However, before critically assessing the impact of the free movement provisions on the coordination of social security systems, and on access of welfare benefits more generally, it is first necessary to recall the basic principles established by the case-law in relation to the free movement rights.

Since the 1970s, when the free movement provisions became directly effective, the CJ has elaborated a bi-partite test to establish the compatibility with Community law of national rules which are not directly discriminatory. First, a national rule must fall within the scope of the relevant Treaty provision; and second, it must be justified ([528]). In order to be justified a rule must pursue a public interest compatible with Community law (and unless the rule is clearly protectionist this will always be the case); and it must be necessary and proportionate.

For practical purposes, the real test for assessing compatibility with Community law once a rule is found to fall within the scope of the free movement provisions is then the proportionality/necessity test. Whilst, in theory, it is for the national court to assess

([526]) I am very grateful to Yves Jorens and Michael Couchier for having organised such a stimulating conference and to the participants of the conference for a lively discussion.

([527]) There is an extensive body of literature on the effect of Union citizenship on welfare provision; e.g. G. de Búrca (ed.) EU law and the welfare state (OUP, 2005); M. Dougan and E. Spaventa (eds) Social welfare and EU law (Hart Publishing, 2005); A. Somek 'Solidarity decomposed: being and time in European citizenship' (2007), European Law Review 787.

([528]) Consistent case-law, see, for example, Case 33/74 C. H. M. Van Bisbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid [1974] ECR 1299.

proportionality, the CJ often engages in such exercise. Since the assessment of proportionality is a powerful tool, in that it allows the judiciary to scrutinise the legitimacy of the way policy choices are pursued by the legislature, the CJ has been accused of pushing its own vision of the internal market at the expenses of (more legitimate) political choices exercised by the legislative institutions at national and European level. This criticism became stronger in the mid-1990s, following a considerable expansion of the definition of barrier to movement relevant to bring a factual situation within the scope of the Treaty ([529]). As the scope of the Treaty expanded, so did the fields in which the CJ could scrutinise the proportionality of national rules and therefore become the final arbiter as to the legitimacy of national regulatory practices which, far from being discriminatory, sometimes reflected true political choices not only as to the level of regulation in the market, but also about the way public expenditure should be organised ([530]).

The effects of the introduction of Union citizenship, which became apparent only in the late 1990s ([531]), determined a further expansion of the scope of the Treaty: this time, however, the rules under scrutiny were not market rules and indeed many rules concerned access to welfare provision ([532]); furthermore, some of the rules which came under scrutiny were the result of the correct implementation of secondary Community legislation, and therefore of political choices made at the highest level ([533]). As a result of this case-law, the CJ was then accused of 'welfare engineering', i.e. of attempting to create, single-handily and with little political backing, a transnational welfare space where Union citizens would have to assume some responsibility for the fate of their fellow (non-national) Union citizens. This said, it is open to debate whether the case-law in the last decade is better conceptualised as a revolution or as simply an evolution which, even though it caught many by surprise, was consistent with the deeper integration necessary for encouraging, if not all together establishing, an ever closer union amongst the peoples of Europe ([534]).

In this contribution I am going to look at the relevant case-law to assess the impact of the free movement and the citizenship provisions on social security coordination and access to welfare benefits. In particular, I am going to focus on the tension between the primary Treaty provisions, as interpreted by the CJ, and secondary legislation (in particular Regulation (EEC) No 1408/71 and Directive 2004/38/EC) ([535]). I will address these problems thematically rather than historically or having regard to the subject matter. Two main themes emerge: the expansion of the scope of the Treaty through a 'hermeneutic trick'; and the binary approach adopted by the CJ to expand the rights of individuals without challenging the legality of Community secondary legislation. Before addressing these issues, it is, however, worth recalling briefly the consequences of Union citizenship insofar as the application of the principle of non-discrimination on grounds of nationality is concerned.

([529]) The move towards non-discriminatory barrier case-law was first visible in Case C-76/90 M. Säger v Dennemeyer & Co. Ltd [1991] ECR I-4221, in relation to the free movement of services; it was then extended to the freedom of establishment in Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165; and to the free movement of workers in Case C-415/93 Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman [1995] ECR I-4921.

([530]) For example, the case-law on the possibility to claim reimbursement for healthcare received abroad, Case C-157/99 B. S. M. Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473, and see more detail below.

([531]) Starting from the ruling in Case C-85/96 M. M. Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

([532]) For example, Case C-85/96 M. M. Martínez Sala v Freistaat Bayern [1998] ECR I-2691; Case C-184/99 R. Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193.

([533]) For example, Case C-413/99 Baumbast and R. v Secretary of State for the Home Department [2002] ECR I-7091, in relation to the requirements to be satisfied by economically inactive citizens in order to gain a right of residence; Case C-209/03 Bidar [2005] ECR I-2119, in relation to access to maintenance loans; see more detail below.

([534]) See preambles to the TEC and TEU.

([535]) Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons ad to members of their families moving within the Community, as amended. Consolidated version [1997] (OJ L 28, 30.1.1997, p. 1; http://www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf); Regulation (EEC) No 1408/71 will be repealed once Regulation (EC) No 883/2004 on the coordination of social security systems [2004] (OJ L 166, 30.4.2004, p. 1), will enter into force; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004) (OJ L 229, 29.6.2004, p. 35) (hereinafter Directive 2004/38/EC).

## II. UNION CITIZENSHIP AND NON-DISCRIMINATION

I have recalled above that, in assessing the compatibility of national rules with the economic free movement provisions, the CJ adopts a bi-partite approach: first, analysis of the existence of a barrier that brings the situation within the scope of the Treaty; and, second, assessment of the existence of a public interest capable of justifying the rule, which includes the proportionality assessment. Clearly, the broader the scope of the definition of barrier to movement, the broader the scope for the CJ's assessment of the proportionality of national rules. And yet, until the late 1990s, the claimant could bring herself within the scope of the free movement provisions only after having established an economic link (however weak) ([536]). With the introduction of Union citizenship, however, the economic link is no longer necessary and migration alone (if even needed) ([537]) suffices to bring the claimant within the scope of the Treaty by virtue of Article 18 EC ([538]). Furthermore, once the claimant is within the scope of the Treaty, s/he can rely on the general prohibition of discrimination on grounds of nationality contained in Article 12 EC ([539]). And the prohibition of nationality discrimination is interpreted in a broad way so as to encompass not only direct discrimination but also indirect discrimination, and in particular discrimination on grounds of residence or on grounds of length of residence ([540]), as well as discrimination on grounds of migration ([541]).

Clearly, since it is common for entitlement to welfare provision to be restricted to those residing and/or contributing through their economic activity, and to nationals who need not prove a link of 'belonging' to their own state, the combination of Articles 18 and 12 EC is to challenge established requirements in relation to entitlement to welfare provision in the territory of another Member State. Furthermore, since the prohibition of discrimination on grounds of nationality and/or the right to movement have been consistently interpreted so as to encompass the right not to be discriminated on grounds of movement, Article 18 EC also strained, if not altogether challenged, the rules as to the non-exportability of certain benefits, and in particular of special non-contributory benefits ([542]). As we shall see in detail further below, this does not mean that Member States are now obliged to grant benefits or allow exportability to *any* Union citizen regardless of the circumstances of the case; rather, it means that national rules providing for entitlement requirements are now subject to the scrutiny of the Community or/and the national courts as to their necessity and proportionality.

## III. THE PROCESS OF DECONSTRUCTING AND RECONSTRUCTING THE SCOPE OF THE TREATY

I mentioned above that one of the effects of the introduction of Union citizenship is to sever the link between economic activity and entitlement to rights under Community law. This is particularly important

([536]) In particular the CJ weakened the necessary economic link by allowing service recipients (mainly tourists) to rely on Article 12 EC in relation to anything connected to the reception of tourist services; see, for example, Case 186/87 Cowan v le Trésor Public [1989] ECR 195; Case C-45/93 Commission v Spain (museum admission) [1994] ECR I-911.

([537]) See, for example, Case C-148/02 Garcia Avello [2003] ECR I-11613, where the mere desire to move in the future was enough to bring the situation within the scope of the Treaty; Case C-212/06 Government of the French Community and Walloon Government v Flemish Government [2008] ECR I-1683, where the notion of potential discouragement was used in a case which would have otherwise been purely internal; and Case C-403/03 Schempp [2005] ECR I-6421, where movement of the former wife of the claimant was enough to establish the intra-Community link. I have argued elsewhere in favour of formally departing from the need to establish an intra-Community link so as to extend the scope of the Treaty to cover also (some) purely internal situations; see E. Spaventa 'Seeing the woods despite the trees? On the scope of Union citizenship and its constitutional effects', (2008) 45, Common Market Law Review 13.

([538]) For example, Case C-224/98 M. N. D'Hoop v Office national d'emploi [2002] ECR I-6191.

([539]) For example, Case C-85/96 M. M. Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

([540]) For example, Case C-192/05 Tas-Hagen and Tas [2006] ECR I-10451; Case C-209/03 Bidar [2005] ECR I-2119.

([541]) For example, Case C-224/98 M. N. D'Hoop v Office national d'emploi [2002] ECR I-6191.

([542]) For example, Case C-192/05 Tas-Hagen and Tas [2006] ECR I-10451.

in relation to welfare benefits, including benefits falling within the scope of Regulation (EEC) No 1408/71, which before were reserved to economically active migrants. The effect of the introduction of Article 18 EC then is to open up new possibilities for those who were previously excluded from the scope of Community law because they did not engage in work or did not provide or receive services. However, in the early stages of interpretation of Article 18 EC, it was unclear what this actually meant. Thus, the Member States had a legitimate expectation that Union citizenship would simply codify the status quo in primary Treaty law. In this respect, it should not be forgotten that prior to the Maastricht Treaty three directives were adopted granting movement and residency rights to economically inactive people ([543]). Those directives restricted the rights of residence to those who were economically independent, who would therefore not qualify for means-tested benefits, and who had health insurance in respect of all risks. Furthermore, the directives made clear that economically independent migrants should not become an unreasonable burden on the welfare provision of the host state ([544]). Article 18 EC in turn referred to the limitations and conditions imposed by secondary legislation therefore, in the mind of the drafters, ring-fencing potential claims on welfare provision in the host state. Thus, the provisions and requirements contained in the residence directives would constitute the limitations referred to by Article 18 EC and therefore economically inactive citizens would not have a claim on host welfare provision.

However, in *Sala* ([545]) the CJ took a different interpretative path from that which could be expected and instead engaged in a process of deconstruction and reconstruction of Community law ([546]). The case concerned the rights of a Spanish citizen lawfully living in Germany by virtue of a bilateral treaty between Germany and Spain (i.e. not by virtue of Community law). Even though Mrs Sala could not be deported, she was not entitled to a residence permit; and possession of a residence permit was a precondition to access some welfare benefits, including the child-raising allowance that Mrs Sala was denied exactly because she did not possess a residence permit. The allowance fell within the scope of both Regulations (EEC) Nos 1408/71 ([547]) and 1612/68 ([548]); and the residence permit requirement was discriminatory since it did not have to be satisfied by German nationals. Since there were some doubts as to whether Mrs Sala could be considered a worker falling within the scope of either the regulations, or indeed of Article 39 EC, the question was whether the situation fell nonetheless within the scope of the Treaty by virtue of the citizenship provisions and if so whether Article 12 EC was applicable.

The CJ found that Mrs Sala fell within the scope *ratione personae* of the Treaty by virtue of being a Union citizen; it then found that the benefit in question fell within the scope *ratione materiae* of the Treaty by virtue of it falling within the scope of Regulations (EEC) Nos 1408/71 and 1612/68. Since the benefit fell within the scope of Community law and since Mrs Sala fell within the personal scope of the Treaty, Article 12 EC applied and Mrs Sala was entitled to the benefit.

The *Sala* ruling is concise and therefore difficult to understand: but what is interesting for our purposes is the CJ's reasoning in relation to what falls within the material scope of the Treaty. Such reasoning might appear rather circular, if not altogether perverse. In this respect consider that the fact that child-raising benefits fall within the scope of

([543]) Council Directive 90/364/EEC on the right of residence (OJ L 180, 13.7.1990, p. 26); Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.9.1990, p. 28); Council Directive 93/96/EEC on the right of residence for students (OJ L 317, 18.12.1993, p. 59).

([544]) Article 1 of Council Directive 90/364/EEC on the right of residence (OJ L 180, 13.7.1990, p. 26); Article 1 of Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.9.1990, p. 28); Article 1 of Council Directive 93/96/EEC on the right of residence for students (OJ L 317, 18.12.1993, p. 59).

([545]) Case C-85/96 M. M. Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

([546]) On the Sala ruling see S. O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999), 24 European Law Review 68; J. Shaw and S. Fries, 'Citizenship of the Union: First steps in the European Court of Justice' (1998), 4 EPL 533.

([547]) As it was a family benefit falling within Article 4(1)(h).

([548]) As it was a social advantage falling within the meaning of Article 7(2).

Community law is not a novelty; however, according to Community law it is only a given category of people defined in secondary legislation that can claim equal treatment for those benefits. In other words, it seems clear that, pre-*Sala*, the two conditions (falling within the personal scope of Regulation (EEC) No 1408/71, of Regulation (EEC) No 1612/68 or of Article 39, and within their material scope) had to be fulfilled simultaneously.

However, in *Sala*, the CJ deconstructs the way material and personal scope have to be interpreted: as a result, rather than having to meet the two conditions in relation to the same piece of legislation, the two can be separated so that falling within one of the Treaty provisions, and in particular within Article 18 EC, allows to claim equal treatment in relation to any benefit ever mentioned by the Community legislature, even when the clear aim of the legislature is to limit the claimants entitled to a given benefit and therefore *exclude* all other claimants from the possibility to invoke equal treatment.

The impact of Union citizenship on social security claims is then dramatic in that it opens up the potential class of citizens entitled to rely on equal treatment in order to obtain welfare provision from the host state. And yet, reliance on Articles 18 and 12 EC rather than on Regulation (EEC) No 1408/71 is conceptually different and might lead to different outcomes: indirect discrimination can be justified, and therefore the rights granted through Articles 18 and 12 EC appear, at least theoretically, more limited than those provided for in Regulation (EEC) No 1408/71 where, once a claimant succeeds in bringing herself within both the personal and the material scope of the regulation, she might be in a much stronger position than if she fell within Article 18 EC [549].

This process of deconstruction and reconstruction is evident in other fields of Community law, and most notably in the field of education. It might be recalled that the students directive excluded the migrant student's entitlement to maintenance grants awarded by the host state [550]; and that it, as the other residence directives, provides that students must have adequate resources so as not to become a burden on the social assistance of the host state. In a line of case-law that started with the ruling in *Grzelczyk* [551], the CJ applied the *Sala* reasoning to students.

Mr Grzelczyk, a French student in Belgium, claimed the *minimex*, a minimum subsistence allowance, in order to be able to focus on his studies during the last year of his university degree. Mr Grzelczyk was denied the benefit since he was not a 'worker' pursuant to Community law and therefore could not rely on Article 7(2) of Regulation (EEC) No 1612/68. The CJ found, however, that he fell within the scope of Community law by virtue of the citizenship provisions and that, therefore, pursuant to the *Sala* ruling, he could claim equal treatment in relation to welfare benefits, including the *minimex*. In order to avoid the constraints imposed by secondary legislation, the CJ held that, whilst Directive 93/96/EEC expressly excluded foreign students from eligibility to maintenance grants, it did not exclude them explicitly from entitlement to other welfare benefits.

The ruling in *Grzelczyk* confirmed the *Sala* ruling in that it clarified that lawfully resident Union citizens might rely on Article 12 EC in order to claim welfare benefits regardless of the constraints imposed by secondary Community law. However, in *Grzelczyk*, the CJ also qualified the *Sala* ruling, since it accepted that excessive reliance on the host welfare system might transform the citizen into an

[549] This will depend very much on what is claimed as in certain instances indirect discrimination can be justified also in relation to Regulation (EEC) No 1408/71; however, in cases such as exportability of benefits or the possibility to seek healthcare abroad, the regulation grants 'rights' and Member States cannot depart from what is established by the regulation itself; see discussion below.

[550] Article 3 of Council Directive 93/96/EEC on the right of residence for students (OJ L 317, 18.12.1993, p. 59).

[551] Case C-184/99 R. Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193.

'unreasonable burden' and, should that be the case, the Member State would be entitled to terminate the right of the Union citizen to reside in its territory ([552]). This concession to Member States' preoccupations in relation to excessive claims on their welfare provision is, however, much more limited than it might appear at first sight: first of all, the CJ does not clarify *when* a citizen would become an 'unreasonable burden' and, given that the principle of proportionality always applies in those cases, it is clear that a once-off claim would not suffice to terminate the citizen's right of residence and therefore their right to welfare provision ([553]). Second, this case-law significantly complicates the national administrative framework for eligibility to welfare benefits: lawfully resident Union citizens can no longer be denied welfare benefits on the sole grounds that they are economically inactive. Rather, and as clarified by subsequent case-law ([554]), the administrative authorities must investigate the claim to assess whether the burden imposed on the national welfare system is 'reasonable' or 'unreasonable', which is to say that the administrative authorities will have to conduct an assessment having regard to the particular circumstances of the claimant at issue. Finally, the CJ fails to specify whether the idea of 'reasonableness' in relation to the burden imposed on the public purse is to be assessed in relation to the single claim, in which case it would hardly ever be satisfied, or in relation to the potential cumulative effect of claims by several citizens.

The expansive effect of the Union citizenship provisions is confirmed in subsequent case-law. In the case of *Bidar* ([555]), a French national who was undergoing his university education in the UK claimed a maintenance loan, which was denied on the grounds that he was not 'settled' in the UK for the purposes of the relevant legislation ([556]). It should be recalled that pursuant to Directive 93/96/EEC foreign students are not entitled to maintenance grants or maintenance loans from the host state. However, the CJ found that, since Mr Bidar had resided in the UK before becoming a university student, his right of residence derived *not* from the students directive but rather from Directive 90/364/EEC, the general residence directive. The latter did *not* explicitly exclude maintenance grants. Furthermore, the CJ found that maintenance grants fell within the scope of Community law following the adoption of Directive 2004/38/EC (even though the directive was not in force at the time of the ruling). However, it should be noted that the directive *excludes* the right to equal treatment in relation to maintenance grants for economically inactive migrants until they have acquired the right to permanent residence ([557]). Nonetheless the CJ found that since such maintenance grants are available for workers and their family members, as well as for permanent residents, those grants fall within the scope of Community law and therefore, following the *Sala* ruling, Article 12 EC applies.

The *Bidar* ruling might have been recently at least partially overruled ([558]). However, for our purposes what is interesting is the reasoning underlying it: the process of deconstruction and reconstruction is not dissimilar from that adopted in *Sala*: the exclusion of someone from a benefit which is granted only to 'some' citizens does not affect their rights under the primary Treaty provisions. Furthermore, a comparison between *Grzelczyk* and *Bidar* might be useful to

([552]) Case C-184/99 R. Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, para. 42.

([553]) This principle has now been codified in Article 14(3) of Directive 2004/38/EC.

([554]) For example, see Case C-413/99 Baumbast and R. v Secretary of State for the Home Department [2002] ECR I-7091, although this case concerned the right to reside rather than access to benefits; Case C-209/03 Bidar [2005] ECR I-2119.

([555]) Case C-209/03 Bidar [2005] ECR I-2119; noted by C. Barnard (2005) Common Market Law Review 1465; see also M. Dougan 'Fees, grants and dole cheques: who covers the cost of migrant education within the EU?' (2005), 42 Common Market Law Review 943.

([556]) According to the English rules at issue, in order to qualify for the maintenance loans a person needed to have resided in England for at least three years and the residence should not be wholly or in part for the purpose of receiving full-time education. Mr Bidar had resided in England for three years but he was attending school and therefore did not qualify for the loan.

([557]) Article 24(2) of Directive 2004/38/EC; economically inactive migrants gain full equal treatment rights after five years of lawful residence (right to permanent residence).

([558]) Case C-158/07 Förster, judgment of 18 November 2008, not yet published, discussed below.

fully appreciate the CJ's desire to use hermeneutic tools in a teleological way, where the *telos* is the integration of the citizen not only in the host state but also in the host welfare community. Thus, note how effectively the CJ plays with secondary legislation to achieve the desired result: Mr Grzelczyk is entitled to the *minimex* because the students directive does not explicitly exclude it; and Mr Bidar, also a student, can instead rely on the general residence directive to avoid the explicit exclusion of entitlement to maintenance grants provided for in the students directive.

The same expansive approach can be found also in the case of *Collins* ([559]). Mr Collins was an Irish national who moved to the UK to seek employment; within a week of his arrival he applied for a job-seeker's allowance. The allowance was refused on the grounds that Mr Collins was not 'habitually resident' in the UK. According to pre-existent case-law, job-seekers only had a semi-status in Community law, so that they were not entitled to rely on Article 39(2) EC in relation to unemployment benefits ([560]). However, the CJ held that following the introduction of Union citizenship it was no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the host state. Since the habitual residence requirement was indirectly discriminatory, in that it could be more easily satisfied by own nationals, it needed to be justified. The CJ acknowledged that the residence requirement pursued the legitimate aim of ensuring that the claimant had established a genuine link with the host employment market. However, the principle of proportionality demanded that the period of residence necessary to establish such a connection did not exceed what was necessary for the authorities to satisfy themselves of the fact that the person concerned is genuinely seeking work. Once again then, the CJ then requires Member States to have due regard to the particular circumstances of the claimant. Furthermore, the CJ's ruling is, again, at odds with the provisions of secondary legislation. In particular, Directive 2004/38/EC, which had been adopted at the time of the ruling although was not yet in force, provides that job-seekers are excluded from the equal treatment obligation in relation to welfare provision ([561]).

The Union citizenship case-law then has a considerable impact on entitlement to welfare provision beyond what is provided for in secondary legislation. And what is particularly interesting for our purposes is this process of deconstruction and reconstruction of the scope of Community law so as to give effect to the citizenship provisions. As a result, the care that the legislature might take in limiting the class of potential claimants to welfare provision is of little consequence, if not altogether counter-productive, to the rights that citizens will derive from Community law ([562]).

## IV. THE BINARY APPROACH

We have seen above that following the introduction of Union citizenship the CJ has engaged in a process of deconstruction and reconstruction of the scope of Community law which has deeply affected the obligations that Member States bear in relation to migrant Union citizens. We have seen also that this process of reconstruction takes as its starting point both Treaty provisions and secondary legislation which as a result relate in a novel way so as to stretch, if not altogether explode, the requirements to be satisfied by Union citizens before being eligible for welfare provision.

There is, however, another strand of case-law which is relevant in analysing the impact of the primary Treaty provisions on the welfare systems of the Member

([559]) Case C-138/02 Collins [2004] ECR I-2703.

([560]) Case 316/85 Lebon [1987] ECR 2811.

([561]) On the issues raised by the ruling in Collins, see Advocate General Ruiz-Jarabo Colomer's opinion in Joined Cases C-22/08 and 23/08 Vatsouras, opinion delivered 12 March 2009, case still pending at the time of writing.

([562]) See also M. Dougan 'Expanding the frontiers of European Union citizenship by dismantling the territorial boundaries of the national Member States?' in C. Barnard and O. Odudu, The outer limits of European Union law (Hart Publishing, 2008), 119.

States: these are cases in which national rules which correctly implemented provisions of secondary legislation were nonetheless found to be incompatible with the primary Treaty provisions, at least insofar as the specific case was concerned. Those cases concerned access to healthcare provision in a state different from the one with which the claimant was insured.

It might be recalled that Article 22 of Regulation (EEC) No 1408/71 provides, inter alia, that those ensured in a Member State are entitled, prior authorisation of the competent Member State, to go to another Member State to there receive healthcare provision. According to the regulation, the authorisation might not be refused when the treatment is among the benefits provided for by the competent Member State; and where the claimant cannot be given such treatment within the time normally necessary for obtaining the treatment in question having regard to the person's current state of health and the probable course of the disease.

In a series of cases ([563]), the regime provided by the regulation came under strain as the CJ found that, even though the claimants did not fulfil the conditions provided for by national rules correctly giving effect to Regulation (EEC) No 1408/71, they were still eligible for support under Article 49 EC. In *Vanbraekel* ([564]), the issue related to hospital treatment administered by an institution in a Member State other than that with which the patient was affiliated. The question did not concern the prior authorisation, which had been granted *ex post*, but rather the level of reimbursement. According to the provisions of Regulation (EEC) No 1408/71 the migrant patient has a right to receive healthcare in another Member State has if she were insured with the latter's system. In the case at issue, reimbursement according to the rules of the host state was less advantageous than reimbursement according to the rules of the Member State of provenance. The CJ held that Article 49 EC grants a right to be reimbursed according to the rules of the state of provenance: in the case in which a patient falls within both the scope of Regulation (EEC) No 1408/71 and of Article 49 EC, she can choose to be reimbursed according to the most favourable rules. In the case in which, however, the patient falls only within the scope of Article 49 EC since she does not meet the condition provided for in the regulation, reimbursement will always be limited to the tariffs established by the home Member State ([565]). Further, in *Peerbooms* ([566]), the CJ held that the prior authorisation required by national law to be eligible for reimbursement of expenses for medical treatment incurred abroad was a barrier falling within the scope of Article 49 EC and needed therefore to be justified, even though the prior authorisation requirement is provided for in Regulation (EEC) No 1408/71. In *Müller Fauré* ([567]), the CJ went further and held that in the case of non-hospital treatment the prior authorisation requirement is incompatible with Article 49 EC, even though again the prior authorisation requirement is provided for in Regulation (EEC) No 1408/71; and in *Watts* the CJ made clear that the existence of waiting lists is not a sufficient reason to deny authorisation to seek treatment abroad ([568]).

([563]) The healthcare cases have given rise to a lively academic debate; see, for example, P. Cabral, 'Cross-border medical care in Europe: Bringing down a first wall' (1999) 24 European Law Review 387; A. P. Van der Mei, 'Cross-border access to medical care in the European Union — Some reflections on the judgments in Decker and Kohll' (1998), 5 MJ 277; M. Fuchs 'Free movement of services and social services: Quo vadis?' (2002), 8 European Law Journal 536; E. Steyger 'National health care systems under fire (but not too heavily)' (1999) 29 LIEI 97; A. P. Van der Mei. 'Cross-border access to medical care in the European Union — Some reflections on Garaets-Smits and Peerbooms and Vanbraekel' (2002), 9 MJ 189; G. Davies 'Welfare as a service' (2002), 29 LIEI 27; and V. Hatzopoulos 'Killing the national health systems but healing the patients? The European market for healthcare after the judgment of the ECJ in Vanbraekel and Peerbooms' (2002), 39 Common Market Law Review 683; E. Spaventa 'Public services and European law: Looking for boundaries' (2002–03), 5 CYELS 271; T. Hervey 'Mapping the contours of European Union health law and policy' (2002), 8 EPL 69; A. Dawes 'Bonjour Herr Doctor: National healthcare systems, the internal market and cross-border medical care within the European Union' (2006), 33 LIEI 167; G. Davies 'Competition, free movement and consumers of public services' (2006), 17 EBL Rev. 95; C. Newdick 'Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity' (2006), 43 Common Market Law Review 1645.

([564]) Case C-368/98 Abdon Vanbreakel and Others v Alliance nationale des mutualités chrétiennes [2001] ECR I-5363.

([565]) See also Case C-385/99 Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, and van Riet v Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen [2003] ECR I-4509.

([566]) Case C-157/99 B. S. M. Garaets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473.

([567]) Case C-385/99 Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, and van Riet v Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen [2003] ECR I-4509.

([568]) Case C-372/04 Watts [2006] ECR I-4325.

In all those cases, the CJ did not question the fact that those national rules were compatible with the regime established by Regulation (EEC) No 1408/71; nor did it question the regime established by the regulation itself; and yet, it found the national rules at issue to be incompatible with Article 49 EC. The question is then how to reconcile the compatibility of the regime introduced by the regulation, which provides for the prior authorisation requirement, with the case-law of the CJ. After all, if the prior authorisation requirement is a hindrance to movement which is caught by Article 49 EC and needs to be justified, and which is in certain cases incompatible with Community law, then Article 22(1)(c) of Regulation (EEC) No 1408/71, which provides for said prior authorisation, should also be deemed incompatible with the primary Treaty provisions ([569]).

This discrepancy, which arises in a similar way in relation to the requirements to be satisfied in order to be eligible for residency rights in the citizenship context, is therefore difficult to explain. In the wake of the *Baumbast* ruling ([570]), Michael Dougan and I argued that the CJ has introduced a cleavage approach to the interpretation of the relationship between primary and secondary legislation in relation to Union citizenship ([571]). Thus, the black-letter rights provided by the then three residence directives, and now by Directive 2004/38/EC, constitute the floor of rights granted to Union citizens. If the citizen satisfies those requirements then she is automatically entitled to the right to reside. That is true also in relation to healthcare provision abroad pursuant to Regulation (EEC) No 1408/71 (and probably in relation to many if not all of the rights granted by the regulation): if the patient is granted prior authorisation, or s/he satisfies the requirements for prior authorisation, then s/he has a right to travel to another Member State and receive benefits in kind as if s/he were insured in that Member State. However, if the citizen fails to satisfy the black-letter requirements imposed by Community secondary legislation, be that Directive 2004/38/EC or Regulation (EEC) No 1408/71, then s/he might have a right in primary legislation which is at the same time more limited and more extensive than that granted by secondary legislation. It is more extensive because it clearly goes beyond what is provided in secondary law; but it is also more limited since it will depend on an appraisal of the factual circumstances at stake and on whether denial of the right is a justified and proportionate response by the Member State. The fact that now we have to see secondary legislation and primary Treaty provisions as constituting, respectively, the floor and the ceiling of the rights granted in Community law was indirectly confirmed by the abovementioned ruling in *Vanbrekael*, where the CJ held that, when the patient falls within the scope of Regulation (EEC) No 1408/71, she can choose between the level of reimbursement provided by the latter (i.e. that provided by the host state) and that provided by Article 49 EC (i.e. that provided by the state of origin).

The binary approach established through the case-law, however shocking for the Member States, unwilling to see new obligations imposed on public finances, especially when those result from what could be perceived as the bypassing of carefully reached political compromises, can be considered a development of established principles in relation to the free movement of persons. Here, since the 1970s, the CJ has made clear that rights that

([569]) The Commission has put forward a proposal for a directive codifying the case-law on healthcare provision; see proposal for a directive on the application of patients' rights (2008) (COM(414) final); the proposal was approved with amendments by the European Parliament on 23 April 2009.

([570]) See Case C-413/99 Baumbast and R. v Secretary of State for the Home Department [2002] ECR I-7091.

([571]) M. Dougan and E. Spaventa, 'Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article18 EC' (2003), 28 European Law Review 699; see also M. Dougan 'The constitutional dimension to the case-law on Union citizenship' (2006), 31 European Law Review 613; and E. Spaventa, Free movement of persons in the European Union — Barriers to movement in their constitutional context (Kluwer Law International 2007), especially Chapters 6 and 7; and E. Spaventa, 'Seeing the woods despite the trees? On the scope of Union citizenship and its constitutional effects' (2008), 45 Common Market Law Review 13.

derive directly from the Treaty can be clarified by secondary law, but are not per se 'established' by such case-law ([572]). Seen in this light, the case-law might appear less surprising: after all, the CJ has always considered that limits imposed in secondary legislation are not necessarily conclusive: they might be legitimate per se, since they would satisfy what is perceived to be a legitimate public interest by the political institutions, and yet they cannot impinge on the interpretation given by the CJ to the primary Treaty provisions (although they might well drive it). It is for the latter alone to decide the boundaries of the rights granted by the Treaty: secondary legislation simply gives effect to those rights. And naturally, the content of the Treaty provisions, like that of constitutional rights, evolve with time, whilst black-letter provisions are less dynamic in nature. The binary approach thus makes perfect constitutional sense albeit it might ruffle some political feathers.

## V. THE EXPORTABILITY OF BENEFITS BEYOND REGULATION (EEC) NO 1408/71

The binary approach adopted in relation to secondary legislation on the one hand, and Treaty rights on the other, has important repercussions in relation to the right to export benefits beyond the provisions of Regulation (EEC) No 1408/71. Here, the combination of the right to free movement granted by Article 18 EC and the interpretation technique adopted by the CJ (both the binary approach and the *Sala* approach) challenge residence requirements in relation to benefits covered by Regulation (EEC) No 1408/71 even when such residence requirements would in themselves be compatible with the regulation. Thus, once again, the fact that a restriction is consistent with the regime provided for by secondary legislation is not conclusive as to its compatibility with Community law.

In *De Cuyper* the issue related to a residence requirement in relation to an unemployment allowance ([573]). Mr De Cuyper received such a benefit from Belgium, and because he was above 50 years of age he was exempted from the obligation to submit to the local control procedures. However, the benefit was still conditional upon residence in the Belgian territory: following an inspection, the authorities found that Mr De Cuyper was living in France and therefore terminated the benefit and asked for repayment of the sums that had been granted whilst Mr De Cuyper was resident in France. Mr De Cuyper argued that the residence requirement was a restriction on his right to move and reside anywhere in the EU granted by Article 18 EC. The CJ found that the benefit in question was indeed an unemployment benefit which according to the provisions of Regulation (EEC) No 1408/71 could be made conditional upon residence in the territory of the state awarding the benefit ([574]). However, the CJ also found that since a residence requirement was a restriction to the rights granted to European citizens to move and reside anywhere in the Union, it fell within the scope of Article 18 EC even though it was allowed under Regulation (EEC) No 1408/71. For this reason, the requirement needed to be justified, i.e. pursue a legitimate interest and be proportionate and necessary for its achievement. In the case at issue, the residence requirement was justified since the authorities needed to be able to monitor compliance with the legal requirements upon which the granting of the benefit was conditional ([575]).

([572]) For example, interpretation of the public policy derogation; or the fact that documents required by secondary legislation are mere evidence of the right at issue and are not constitutive of them; see, for example, Case C-459/99 Mouvement contre le racisme, l'antisémitisme et la xénophobie (MRAX) ASBL v Belgium [2002] ECR I-6591.

([573]) Case C-406/04 De Cuyper [2006] ECR I-6947; see also M. Cousins 'Citizenship, residence and social security' (2007), European Law Review 386.

([574]) See the conditions contained in Article 69(1) of Regulation (EEC) No 1408/71.

([575]) See also Case C-228/07 Petersen [2008] ECR I-6989, where the CJ held that a residence requirement in relation to an unemployment benefit was a restriction to the free movement of workers (as it was applied to a migrant worker who transferred his residence back to his home state) and, in the case at issue, was not justified.

The fact that the residence requirement was justified in this case should not detract attention from the significance of the ruling. As seen already in the healthcare cases, as well as in the other citizenship cases, the fact that secondary legislation authorises a conduct on the part of the Member State no longer shelters the national rules from further scrutiny: thus, whether the residence requirement in relation to non-contributory benefits is going to be justified will depend very much on the facts of the case at issue. Furthermore, this case-law is not without its practical problems: authorities dealing with social security claims have already a considerable job in checking eligibility for the benefits at issue, as well as policing against the risk of benefit fraud. The case-law of the CJ introduces a new level of complexity since the rules now not only have to be proportionate in the abstract, they also have to be proportionate having regard to the specific facts of the case at issue. This is well illustrated by the case of *Hendrix* ([576]). There the issue related to a benefit for disabled young people. The benefit supplemented the income that the disabled person would obtain from working at a reduced rate under a Dutch government scheme. Mr Hendrix received the benefit until he moved his residence from the Netherlands to Belgium when, as a result of the change of place of residence, he was denied the benefit.

For the purposes of Regulation (EEC) No 1408/71, the CJ classified the benefit as a special non-contributory benefit which could therefore be legitimately reserved to those resident in the national territory ([577]). The CJ, however, also found that Mr Hendrix should be classified as a migrant worker falling within the scope of Regulation (EEC) No 1612/68 and Article 39 EC. Further, the CJ held that the benefit in question could be qualified as a 'social advantage'; it then acknowledged that Regulation (EEC) No 1612/68 explicitly provides that it does not affect rules adopted pursuant to Article 42, including Regulation (EEC) No 1408/71. However, the CJ also stated that Article 7(2) of Regulation (EEC) No 1612/68 is the specific expression of the principle of equality contained in Article 39(2) EC, and should therefore be given the same meaning. As a result, the residence requirement needed to be justified, and be proportionate to the attainment of the aim sought. The CJ then found that, whilst a residence requirement would be in principle justified, its proportionality in the case at issue needed to be assessed by the national court. Thus, since according to Dutch law the residence requirement could be waived if it would give rise to an 'unacceptable degree of unfairness', the CJ instructed the national court to interpret the legislation in the light of Community law, and in particular having regard to the fact that Mr Hendrix had exercised his Article 39 EC rights, and that he had retained a link with the Netherlands ([578]).

The binary approach according to which the regime established in secondary legislation is not conclusive even when such a regime is compatible with the Treaty deeply affects the non-exportability of benefits. Thus, if a benefit can be exported according to the regime established by Regulation (EEC) No 1408/71, exportability will be a matter of right. However, in those instances where the benefit is not one for which exportability is provided for in secondary legislation, the claimant falls in any case within the scope of Community law and it is for the Member State to justify the restriction. Furthermore, and whilst in relation to those benefits which require the authorities to be ale to carry out checks, the residence requirement will be more easily justified, and the authorities might have to take into consideration the factual circumstances pertinent to the claimant.

([576]) Case C-287/05 Hendrix [2007] ECR I-6909.

([577]) Cf. Article 10(a)1 of Regulation (EEC) No 1408/71, and para. 38 of the ruling.

([578]) On the notion of real link see C. O'Brien, 'Real links, abstract rights and false alarms: The relationship between the ECJ's "real links" case-law and national solidarity' (2008), 33 European Law Review 643.

## VI. IMPACT OF UNION CITIZENSHIP ON BENEFITS PREVIOUSLY EXCLUDED FROM COMMUNITY LAW

The introduction of Union citizenship has also had a pervasive effect in relation to the possibility to export benefits which previously fell altogether outside the scope of Community law, such as, for instance, pensions connected to war which according to consistent case-law fell, pre-citizenship ([579]), altogether outside the scope of the Treaty.

Here, one should take care to properly understand the reasoning behind the case-law: it is not that those benefits now fall within the scope of Community law per se; rather it is that any restriction on the freedom to move and reside in another Member State falls within the scope of Article 18 EC. This distinction is of paramount importance in relation to the application of the principle of equal treatment: since such benefits do not fall within the scope of Community law per se, a non-national would not be able to claim such benefits. However, a beneficiary who is entitled, under national law, to claim, for instance, a pension for civilian victims of war, or a war pension of sorts, might have the right to transfer her residence to another Member State without for this reason losing the right to the benefit in question. Otherwise, the right to move would be severely affected: if the pension or the benefit constitutes the main source of income for the claimant, s/he would be unable to exercise her right to move in Community law for fear of losing that benefit.

Thus, for instance, in *Nerkowska* ([580]), Ms Nerkowska was a Polish citizen who during the war had been deported to Russia and, as well as losing her parents, suffered from lasting health problem as a result of her deportation. Under Polish law she was therefore entitled to a pension; however, such a benefit was conditional upon her residing in Poland, whilst Ms Nerkowska resided in Germany. The CJ found that the residence requirement was a disproportionate interference with Ms Nerkowska's right to move. On the one hand, if the residence requirement was aimed at ensuring that the claimant had sufficient connection with the territory of the state awarding the benefit, then it was disproportionate since Ms Nerkowska was a Polish national who had resided and worked in Poland for 20 years and therefore had established a sufficient connection with Polish society. On the other hand, if the national authorities needed to subject her to some health or administrative checks they could simply demand that she return to Poland on an ad hoc basis. The residence requirement was therefore disproportionate.

As mentioned above the effect of this case-law is not to broaden the scope of Community law to incorporate benefits which were previously excluded: rather it is to limit the extent to which the Member States can indirectly restrict movement by demanding that the beneficiary reside within the national territory. The distinction is important since, if the benefit were to fall within the material scope of the Treaty, then Member States would have to justify denial of benefits, which are clearly linked to nationality, to non-nationals. This was confirmed by the CJ in the case of *Baldinger* ([581]), where the CJ held that a war-related benefit fell outside the scope of Community law (in that case Regulation (EEC) No 1612/68 and Article 39(2)). However, any residence requirement imposed by a Member State as a condition for eligibility for benefits now falls within the scope of Article 18 EC and needs therefore to be justified.

([579]) For example, Case 207/78 Even [1979] ECR 2019; Case C-315/94 de Vos [1996] ECR I-1417.

([580]) Case C-499/06 Nerkowska [2008] ECR I-3993; see also Case C-192/05 Tas-Hagen and Tas [2006] ECR I-10451; and Case C-221/07 Krystyna Zablocka-Weyhermüller, judgment of 12 December 2008, not yet published.

([581]) Case C-386/02 Baldinger [2004] ECR I-8411.

## VII. THE RULING IN *FÖRSTER* AND THE IMPACT OF DIRECTIVE 2004/38/EC

A more general question, which can be answered only in a speculative way, is whether Directive 2004/38/EC will have any impact on the case-law of the CJ. On the one hand, the directive codifies most of the case-law on citizenship and the free movement of persons existing at the time of its drafting. In this respect, the directive clearly incorporates both the principle of proportionality and the incremental approach to rights in respect of welfare provisions ([582]). Thus, whilst the requirements of sufficient resources and comprehensive health insurance for economically inactive citizens residing in the host state beyond three moths have been confirmed ([583]), the directive also makes clear that recourse to the social assistance of the host state cannot automatically determine the expulsion of the citizen ([584]). Furthermore, the directive provides for a right to permanent residency which is acquired after five years of lawful residency in the host state ([585]). Once a citizen has become a permanent resident, s/he is entitled to equal treatment regardless of economic activity. The directive thus somehow codifies the idea of a 'real link' by establishing that such a link will be presumed after the citizen has resided in the host country for five years.

On the other hand, the provisions of the directive appear more restrictive than the case-law analysed above. In particular, pursuant to Article 24(2) economically inactive citizens, as well as job-seekers, do not have a right to social assistance in the first three months of residence or longer if the job-seeker stays beyond three months. And economically inactive citizens are not entitled to maintenance aids for students, including maintenance loans, until when they acquire permanent residency. As mentioned above, these provisions appear inconsistent with the CJ's approach in both *Collins* and *Bidar*. It might be recalled that in *Collins* the CJ held that, whilst a residence requirement for entitlement to a job-seeker's allowance is justified, it must be limited to a length of time sufficient for the authorities to ascertain that the job-seeker has a real connection with the host employment market ([586]). Article 24(2), however, excludes any entitlement to social assistance for those who are looking for a job. Similarly, in *Bidar* the CJ held that a student might be eligible for a maintenance loan if s/he has established a genuine link with the host state ([587]). In the case at issue, Mr Bidar had resided in the United Kingdom for three years, well short of the five years now required by Directive 2004/38/EC. The question is therefore whether the CJ will be willing to revisit its previous case-law; or whether it will continue to adopt a binary approach to secondary legislation so that if a citizen satisfies the conditions contained in Directive 2004/38/EC s/he will be automatically entitled to the rights therein granted; whilst if s/he does not the proportionality principle applies and entitlement will depend very much on the facts of the case at issue.

In the writer's opinion the answer is mixed and in trying to foresee how the case-law might develop we should recall not only the constitutional principles developed by the CJ, but the reason for their development. In other words, we should distinguish between the constitutional principles 'proper' elaborated by the CJ in relation to Union citizenship, which should continue to apply, and those cases in which the end result was very much driven by the particular circumstances of the case, and that are unlikely to be of more general application. Starting from the latter, a useful, if confused, indication as to

([582]) See also Barnard, 'Annotation on Bidar' (2005), 42 Common Market Law Review 1465, who talks about a 'quantitative approach' to equal treatment (at p. 1468); and by the same author, 'EU citizenship and the principle of solidarity' in M. Dougan and E. Spaventa (eds), Social welfare and EU law (Hart Publishing, 2005), Chapter 8.

([583]) See Article 7(1)(b) of Directive 2004/38/EC.

([584]) See Article 14(3) of Directive 2004/38/EC.

([585]) See Article 16 of Directive 2004/38/EC.

([586]) Case C-138/02 Collins [2004] ECR I-2703.

([587]) Case C-209/03 Bidar [2005] ECR I-2119.

the possible future developments of the case-law comes from the recent ruling in *Förster* ([588]).

There, Ms Förster, a German citizen, went to the Netherlands in order to study and train as a teacher. During the course of her studies she was engaged in various jobs and received a maintenance grant as a worker. However, following an inspection, the awarding body found that she had not been working for a period of about six months and claimed repayment of the maintenance grant for the period in which she was not economically active. According to Dutch rules, economically inactive citizens qualified for maintenance grants only after five years of residence whilst at the time in which she was not employed Ms Förster had been residing in the Netherlands for little over three years. Ms Förster claimed that the *Bidar* ruling applied to her and that she should be entitled to equal treatment since she had demonstrated a sufficient link with the host country. It should also be noted that, after completion of her degree, Ms Förster found employment and therefore remained in the Netherlands.

The CJ found that the five-year residence requirement was justified and that it did not go beyond what is necessary to ensure that the Union citizen is integrated in the society of the host state. The CJ distinguished the case at issue from the ruling in *Bidar*, by relying on the fact that the British rules in the latter made it impossible for students to ever qualify for maintenance grants, since periods of residence for study purposes were not taken into consideration to establish length of residence. On the other hand, in *Förster* the reason why someone had resided in the Netherlands was immaterial for establishing the required length of residence.

The significance of the ruling in *Förster* might go well beyond the case of maintenance grants and raises questions as to how much of the case-law on citizenship, and possibly also on healthcare services, will survive. In this respect, in the writer's opinion, the most important shift consists in the return to an abstract analysis of the rules at issue, rather than the assessment of the proportionality of the application of the rules to the facts of a particular case. The case-law before *Förster* was heavily centred on the individual claimant, with all the problems that this might create for the administrative authorities, but with a real attention for the proportionality of the state's response to that individual case. Thus, the notion of 'real link' that justified claims on the host welfare society was assessed having regard to the individual case and seemed aimed at distinguishing 'good claimants' — those in temporary difficulties (*Grzelczyk*), those who were truly in exceptional circumstances and were not trying to unduly exploit the generosity of the host society (*Bidar*), those who were bona fide claimants (*Sala*, *Collins*) — from 'bad claimants', i.e. benefit tourists. On the other hand, in *Förster* the CJ wholly disregards the situation of Ms Förster, who was clearly a bona fide claimant — someone who had engaged in paid work, who was there to stay and who found paid employment in the Netherlands — to return to an abstract assessment of the rules at issue. Furthermore, the CJ also disregards the legitimate expectation that its own case-law might have created, to reach a result — the repayment of the grant received — that was as surprising as unfair on the claimant.

In the writer's opinion *Förster* is a clear sign of the CJ's willingness to accept legislative choices insofar as those are generally justified. In other words, the ruling in *Förster* might signal the CJ's acceptance of the legitimacy to restrict support for students to those who have an economic link (because they themselves were economically active ([589]); or because they are the children of an economically active citizen); and to those who have established a genuine link with the host society through a very prolonged residence. Furthermore, the ruling in *Förster* should also be seen in the context of recent case-law where the CJ is exploring the potential

([588]) Case C-158/07 Förster, judgment of 18 November 2008, not yet published.

([589]) See, for example, Case C-413/01 Ninni-Orasche [2003] ECR I-13187.

of the citizenship provisions for the exportability of student support awarded by the country of origin ([590]). In the writer's opinion the case-law is more likely to develop in relation to own state support so that less and less will the Member State be allowed to hinder the movement of students by confining support to those who enrol in universities within their own territory. Here we could see a development similar to what has happened in the health-care services, where Member States might be under an obligation to allow the student to transfer to another Member State the support that s/he would have received at home. Furthermore, the return to a more abstract assessment of the legitimacy of the rules at issue might signal the development of a more mature case-law.

And yet, *Förster* is a very confusing case and leaves open the question as to how much of the citizenship case-law is still good law. It might be that the ruling is confined to students' support, possibly because this is an area where mobility is higher and not uniform across Member States, and where therefore the economic impact of a generous interpretation of the Treaty provisions might be felt more heavily. Thus it could be that, in other cases, the impact of the political choices made in Directive 2004/38/EC on the CJ's case-law might be more limited. It has been recalled above that the CJ in *Collins* indicated that the Member State might refuse a job-seekers' allowance to a migrant job-seeker only to the extent to which the latter has not yet established a genuine link with the employment market of the host state. On the other hand, Article 24(2) of Directive 2004/38/EC provides that Member States are not obliged to confer entitlement to social assistance to job-seekers. And Article 14 of Directive 2004/38/EC provides that recourse to social assistance shall not determine the automatic expulsion of the Union citizen (including the job-seeker); and that the job-seeker is entitled to stay beyond the first three months without having to satisfy any further condition if s/he can demonstrate a genuine chance of finding employment. Now it is possible that, despite the explicit wording of the directive, the job-seeker who has demonstrated a genuine chance of finding employment, i.e. who is staying beyond three months, might have also established a real link with the host employment market and therefore might be entitled to claim a job-seekers' allowance ([591]). More generally, and bar a legislative choice of absolute clarity, the principle of proportionality has become a constitutional principle which cannot be disregarded by the legislature.

## VIII. CONCLUSIONS

In analysing the impact of the Treaty free movement and citizenship provisions on social security coordination we have focused on the 'constitutional' effects of the case-law, which is to say on that case-law that might have future implications for eligibility to welfare provision regardless of regimes established by secondary legislation. This case-law is characterised by an expansionist approach as well as by the development of new hermeneutic techniques to enhance the rights of Union citizens whilst, at the same time, not interfering with the validity of secondary legislation adopted before the creation of Union citizenship. Whilst the implications of this case-law from a constitutional perspective are of great significance, the implications on welfare provision from a practical perspective might be more limited.

In particular, the extent to which a Union citizen might claim welfare provision in the host state beyond what allowed by secondary legislation is constrained by the possibility for the Member States to justify imposing residence criteria to

([590]) See Joined Cases C-11 and 12/06 Morgan and Bucher [2007] ECR I-9161; and Case C-76/05 Schwarz and Gootjes -Schwarz [2007] ECR I-6849, noted by M. Dougan, 'Cross-border educational mobility and the exportation of students' financial assistance' (2008), 33 European Law Review 723.

([591]) On this point see also Advocate General Ruiz-Jarabo Colomer's opinion in Joined Cases C-22 and 23/08 Vatsouras, opinion delivered 12 March 2009, case still pending at the time of writing.

ensure that claimants have established a real, and not merely transient, link with the host community. In this respect, from a practical perspective, the case-law has limited effects for economically inactive claimants: on the one hand, before Unions citizen can qualify for a right of residence beyond the first three months, they must meet the conditions of economic independence and comprehensive (or almost comprehensive) ([592]) health insurance. If those conditions are not satisfied it is open to the Member State to refuse the right to reside and therefore eliminate the risk of welfare exploitation. And it is very unlikely that an economically inactive citizen who has resided in the host state for just three months would have established a 'real link' with the host society so as to demand an exception to the resources/insurance rule. On the other hand, whilst a one-off demand on the host welfare society, a temporary difficulty, is not enough to terminate the right to reside, repeated claims might well place the citizen in the 'unreasonable burden' category. The grey area, in this respect, will emerge in relation to those citizens that have resided in the host country long enough to have established a 'real link', say four years, but who are not yet permanent residents. In this respect, it is likely that, as noted by Barnard ([593]), length of residence might be relevant in assessing when the citizen turns from a 'reasonable' to an unreasonable burden. This said, it cannot be excluded that the CJ will now adhere to the provisions of Directive 2004/38/EC and shift from a constitutional to a black-letter approach to welfare entitlement, as it did in the case of *Förster*.

On the other hand, the impact of the citizenship provisions might be felt more heavily in relation to the reinterpretation of the economic free movement rules, and in relation to eligibility to welfare provision within the scope of Regulations (EEC) Nos 1408/71 or 1612/68. Here, the CJ has used the developments which have occurred since the Maastricht Treaty as a tool to open up the potentiality inherent in both primary and secondary legislation. Thus, for instance, in *Gaumain-Cerri* ([594]), the CJ made clear that there is no longer any need to closely investigate whether a claimant falls within the personal scope of Regulation (EEC) No 1408/71 since the combined effect of Union citizenship and the non-discrimination provision might lead to the same result as that which would be achieved should the regulation apply. And, as we have seen in detail above, the reinterpretation of Article 39(2) might well allow job-seekers to seek at least some support from the host state ([595]).

In relation to claims against the home state, the citizenship provisions challenge the limits to the exportability of benefits, including non-contributory benefits. Here, in relation to those situations where the risk of benefit fraud is real, the CJ has been willing to accept, at least in theory, that a residence requirement might be necessary. And yet, and as demonstrated by rulings such as *Hendrix* and *Nerkowska*, the burden of demonstrating that a residence requirement is truly necessary falls upon the Member States. And, after all, the case-law on exportability seems entirely consistent with the creation of a borderless space where citizens can move freely.

Finally, the case-law examined in this contribution clearly shows the inherent limits that constrain political choices at Community level. Secondary legislation might regulate the exercise of Treaty rights, but it cannot exhaust the potential of those rights. This is demonstrated in the case-law concerning healthcare provision, in the case-law on exportability, and in the case-law that departs from the limits set by the residence directives (and

([592]) See Case C-413/99 Baumbast and R. v Secretary of State for the Home Department [2002] ECR I-7091.

([593]) Barnard, 'Annotation on Bidar' (2005), 42 Common Market Law Review 1465; and 'EU citizenship and the principle of solidarity' in M. Dougan and E. Spaventa (eds), Social welfare and EU law (Hart Publishing, 2005), Chapter 8.

([594]) Joined Cases C-502/01 and C-31/02 Gaumain Cerri and Barth [2004] ECR I-6483.

([595]) Case C-138/02 Collins [2004] ECR I-2703; see also Case C-228/07 Petersen [2008] ECR I-6989.

now by the citizenship directive) to find that citizens can claim, in primary law, rights which had not been granted in secondary legislation. From a constitutional perspective this case-law is fully defensible; from a political viewpoint this case-law might be more problematic in that it might be perceived as an undue interference of the CJ in an area which should be left to political negotiation. And yet it should not be forgotten that similar criticisms were raised against the expansionist case-law on the free movement of persons and goods in the 1970s. History tells us that without that case-law the internal market would have remained a chimera and that the political institutions accepted, and in some cases codified, the CJ's approach ([596]). Similarly, the citizenship directive signals the acceptance of the main constitutional framework relating to citizenship elaborated by the CJ. Maybe then the fact that as the area of influence of Community law grows the citizen is entitled to expect a correspondent increase in her rights is far from being a heresy.

([596]) See, for example, Directive 2006/123/EC on services in the internal market (OJ L 376, 27.12.2006, p. 36).